RUMAYA PROPERTIES SDN BHD v. SEACERA DEVELOPMENT SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
HAS ZANAH MEHAT JCA
CHE MOHD RUZIMA GHAZALI JCA
SEE MEE CHUN JCA
[CIVIL APPEAL NO: B-02(IM)(NCvC)-556-03-2022]
22 JUNE 2023

Abstract – *In the assessment of damages in lieu of specific performance, the factors for the court's consideration, amongst others, were (i) 'the present status of the subject matter'; and (ii) 'the element of unjust enrichment'. The substratum for the assessment damages should be based on the original agreement and what was intended by the parties.*

CONTRACT: *Damages – Assessment – Sale and purchase agreement with first developer – First developer abandoned project – Second developer developed high-end project different from first developer – Purchaser obtained order for damages in lieu of specific performance – Basis of assessment by court – Whether assessment based on first project or second high-end project – Factors considered by court – Whether appropriate remedy was value of first project – Whether assessment of damages should be as at date when contract lost – Whether LAD or loss of rental claimable*

The plaintiff had signed 18 sale and purchase agreements ('SPAs') with the second defendant ('D2') to buy 18 units of medium cost apartment in Vista Damansara ('MCA units') and made full payment towards the purchase price. Under the SPAs, the delivery of vacant possession of the plaintiff's MCA units was supposed to be on 18 May 2008. Due to the D2's financial problem, the construction of the project was abandoned. On 27 April 2007, more or less a year before the proposed date of delivery of vacant possession of the plaintiff's MCA units, D2 sold the said land to D1, which was officially transferred to D1 on or about 11 March 2008. D1 had developed a different high-end condominium project known as 'Boulevard Residence' on the land. Therefore, the delivery of vacant possession of the plaintiff's MCA units in Vista Damansara was never materialised. The plaintiff filed an action for an order of specific performance against the defendants to deliver vacant possession of the plaintiff's MCA units premised on the SPAs. In order to continue with the Boulevard Residence development, a consent order was entered between the plaintiff and D1 ('consent order'). Meanwhile, the trial proceeded between the plaintiff and D2, wherein, the judgment of the High Court (HC) was in favour of the plaintiff. Aggrieved, the defendants filed two separate appeals to the Court of Appeal ('CA'). The CA: (i) allowed D1's appeal and set aside the HC judgment against D1 *vide*

A Civil Appeal No B-02(NCVC)(W)-11-01-2015; (ii) allowed D2's appeal in part *vide* Civil Appeal No. B-02(NCVC)(W)-13-01-2015. D1's appeal on liability was dismissed but D1's appeal against the order of specific performance was allowed. The CA further ordered that, damages to be assessed *in lieu* of the specific performance in relation to the MCA units. On
B appeal to the Federal Court ('FC'): (i) D1's appeal was allowed in part; (ii) the CA decision in Civil Appeal No. B-02(NCVC)(W)-13-01-2015 was affirmed and damages were ordered to be assessed against D1 and D2 jointly and severally. The plaintiff filed an application for the assessment of damages pursuant to the Order of the FC. In the assessment of damages proceedings,
C the plaintiff's claim was based on the valuation report prepared by the plaintiff's expert, *ie*, the market value of the high-end condominium in Boulevard Residence. The High Court Judge ('HCJ') held that the damages should be based on the value of 18 units of medium-cost apartments in Vista Damansara and not the high-end condominium in Boulevard Residence and also rejected the plaintiff's LAD claim and the alternative rental claim.
D Hence, this appeal. The crux of the plaintiff's dissatisfaction is on the amount of damages that had been awarded by the HCJ to the plaintiff *in lieu* of specific performance of the SPAs, arguing that the HCJ erred in law and in fact when His Lordship decided to accept the defendants' expert evidence on the value of the MCA units and rejected the plaintiff's expert evidence on the
E value of the MCA units based on the high-end condominium units in Boulevard Residence.

Held (dismissing appeal with costs)
Per Che Mohd Ruzima Ghazali JCA delivering the judgment of the court:

F **(1)** The relevant CA's Order which was affirmed by the FC should be the basis of the assessment of damages before the HC. The CA had directly ruled and held that 'a monetary compensation would be the appropriate remedy to be awarded to the plaintiff in relation to the 18 units of medium-cost apartments that formed the subject matter of the
G 18 principal agreements'. With the specific reference to '18 units of medium-cost apartments' which was considered to be 'the subject matter of the 18 principal agreements' by the CA in its decision, the only inference that could be drawn was that, the damages to be assessed should be based on the value of the medium-cost apartment in Vista Damansara and not the high-end condominium in Boulevard Residence.
H (paras 31 & 32)

(2) The FC, in affirming the CA's decision to award damages *in lieu* of specific performance to the plaintiff, considered the factors, among others, (i) 'the present status of the subject matter', wherein, the
I development of Boulevard Resident was totally different from the development of Vista Damansara, one being high-end condominium and the other, a medium-cost apartment; and (ii) 'the element of unjust enrichment', where it was crystal-clear that the order of specific

performance would unjustly enrich the plaintiff. The two elements were decisive indication in assessing the damages *in lieu* of specific performance. (paras 34-36)

(3) Based on the scheme of the consent order, it was comprehensible that the parties' intention was to preserve the *status quo* of the plaintiff's MCA units, and to deliver and transfer the said units to the plaintiff in the event the plaintiff succeeded in getting the specific performance order of the SPAs. However, once the CA and FC disallowed the specific performance order, the purpose of the consent order could no longer stand and no longer enforceable in the assessment of damages, since the purpose of the order was overtaken by event or, in other words, became obsolete. The HCJ was thus correct in His Lordship's decision to assess the damages in favour of the plaintiff based on the 18 units of MCA in Vista Damansara that formed part of the subject matter in the SPAs entered between the plaintiff and D2 and not the high-end condominium in Boulevard Residence. (paras 40, 41 & 43)

(4) The basis for the assessment of damages should be on the order of the CA which was affirmed by the FC to allow damages *in lieu* of specific performance to the plaintiff. The appropriate remedy to be awarded to the plaintiff in terms of monetary compensation should be the value of the 18 units of MCA that formed the subject matter of the SPAs between the plaintiff and D2, and not the value of high-end condominium in Boulevard Residence. The assessment of damages should be as at the date when the contract was lost. Thus, the relevant date should be the date when D2 transferred the land to D1 on 11 March 2008. (paras 48 & 51)

(5) D2 had breached the SPAs when it abandoned Vista Damansara's development and disposed of the land to D1. Stemming from the CA's decision, as affirmed by the FC, refusing the plaintiff's claim for specific performance, it was explicit that D2 no longer had the ability to deliver vacant possession of the MCA units to the plaintiff under the SPAs. The HCJ was correct in finding that the actual delivery of the MCA units under the SPAs could never take place since the project never materialised. Therefore, LAD or loss of rental based on the MCA units in Vista Damansara was not claimable. (para 55)

Case(s) referred to:

Antara Vista Sdn Bhd v. Rumaya Properties Sdn Bhd [2017] 1 LNS 1876 CA ***(refd)***
Cheng Chuan Development Sdn Bhd v. Ng Ah Hock [1982] 1 LNS 48 FC ***(refd)***
Flint v. Lovell [1934] All ER Rep 200 ***(refd)***
Johnson & Anor v. Agnew [1980] AC 367 ***(refd)***

A *Lee Tiow Kee & Anor v. Ng Geok Hwa [2017] 6 CLJ 339 CA* ***(refd)***
Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***
Tanjung Tiara Sdn Bhd v. Paragro Sdn Bhd [2010] 9 CLJ 400 CA ***(refd)***
Topaiwah v. Salleh [1968] 1 LNS 161 FC ***(refd)***
Voo Nyuk Fah & Anor v. Lam Yat Kheong & Anor [2012] 5 CLJ 229 CA ***(refd)***

B **Legislation referred to:**
Specific Relief Act 1950, s. 21(2)(b)

For the appellant - Gurdial Singh Nijar, Gobinath Karuppan, Abraham Au Tian Hui & Nicholas Wong Shou Jing; M/s Sanjay Mohan
C *For the 1st respondent - Justin Voon Tiam Yu, Alvin Lai Kok Wing & Olivia Lee Xiner; M/s Chong, Ng & Yap*
For the 2nd respondent - Justin Voon Tiam Yu, Alvin Lai Kok Wing; M/s Justin Voon Chooi & Wing

[Editor's note: For the High Court judgment, please see Rumaya Properties Sdn Bhd v. Seacera Development Sdn Bhd & Anor [2022] 1 LNS 697 (affirmed).]
D

Reported by S Barathi

JUDGMENT

E **Che Mohd Ruzima Ghazali JCA:**

Introduction

[1] This is an appeal which emanated from an assessment of damages heard and decided by the learned High Court Judge (LHCJ) in Shah Alam High Court. In assessing the damages, the LHCJ agreed with the
F respondents'/defendants' expert valuation report and rejected the appellant's/plaintiff's expert valuation report. The LHCJ also dismissed the appellant's/plaintiff's claim for liquidated ascertain damages (LAD) or alternatively, the claim for loss of rental. Dissatisfied with part of the LHCJ decision dated 23 February 2022, the appellant/plaintiff filed an appeal
G against part of the LHCJ's decision.

[2] For ease of reference, parties will be referred to as they were in the original High Court suit, that is, the plaintiff and the defendant. Individually the first defendant and second defendant will be referred to as D1 and D2 respectively, and collectively they will be referred to as the defendants.

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The Salient Background Facts

[3] D2 was the previous owner and developer of a piece of land known as HD(D) 174277 PT 47, Pekan Kayu Ara, Daerah Petaling, Negeri Selangor (the said land). The development project on the said land involved
I the construction of low costs and medium costs apartments known as "Vista Damansara".

[4] The plaintiff had signed 18 sale and purchase agreements (SPAs) all dated 19 May 2005 with the D2 to buy 18 units of medium cost apartment in Vista Damansara (the plaintiff's MCA units). The plaintiff made full payment towards the purchase price of the plaintiff's MCA units in Vista Damansara totalling RM2,657,950. Under the SPAs, the delivery of vacant possession of the plaintiff's MCA units was supposed to be on 18 May 2008.

[5] Due to the D2's financial problem, the construction of the medium cost apartment in the Vista Damansara project was abandoned.

[6] On 27 April 2007, more or less a year before the proposed date of delivery of vacant possession of the plaintiff's MCA units in Vista Damansara, D2 sold the said land to D1 for RM5 million. Consequently, the said land was officially transferred to D1 on or about 11 March 2008. After becoming the new owner, D1 had developed a different high-end condominium project known as "Boulevard Residence" on the said Land. Therefore, the delivery of vacant possession of the plaintiff's MCA units in Vista Damansara was never materialised.

[7] On 11 October 2010, the plaintiff filed an action for an order of specific performance against the defendants to deliver vacant possession of the plaintiff's MCA units in Vista Damansara premised on the SPAs.

[8] In order to continue with the Boulevard Residence development, a consent order was entered between the plaintiff and D1 on 11 October 2011 (the consent order). Meanwhile, the trial proceeded between the plaintiff and D2. At the end of the trial, the High Court granted judgment to the plaintiff on 21 November 2014.

[9] Aggrieved by the decision of the High Court, the defendants filed two separate appeals to the Court of Appeal.

[10] As the High Court judgment affected D1 who did not take part in the trial, the Court of Appeal allowed D1's appeal and set aside the High Court judgment against D1 on 9 December 2016 *vide* Civil Appeal No. B-02(NCVC)(W)-11-01-2015.

[11] Almost a year later, a different panel of the Court of Appeal also allowed D2's appeal in part on 15 December 2017 *vide* Civil Appeal No. B-02(NCVC)(W)-13-01-2015. D1's appeal on liability was dismissed but D1's appeal against the order of specific performance was allowed. The Court of Appeal further ordered that, damages to be assessed *in lieu* of the specific performance in relation to the plaintiff's MCA units in Vista Damansara.

[12] Dissatisfied with the Court of Appeal decisions, all parties filed leave for appeal to Federal Court and obtained leave to appeal from the Federal Court.

[13] In an order dated 28 August 2019 *vide* Civil Appeal No. 02(f)-55-07-2018(B), the Federal Court allowed D1's appeal in part. The Federal Court set aside para. 2 of the Court of Appeal order in Civil Appeal No. B-02(NCVC)(W)-13-01/2015 and maintained the Court of Appeal order in Civil Appeal No. B-02(NCVC)(W)-11-01/2015.

[14] On the same day, the Federal Court dismissed the plaintiff's appeal *vide* Civil Appeal No. 02(f)-54-07/2018(B), affirmed the Court of Appeal decision in Civil Appeal No. B-02(NCVC)(W)-13-01/2015 and ordered damages to be assessed against D1 and D2 jointly and severally.

[15] The plaintiff filed the application for the assessment of damages pursuant to the order of the Federal Court.

The Dispute

[16] In the assessment of damages' proceedings, the plaintiff's claim was based on the valuation report prepared by the plaintiff's expert, that is, the market value of the high-end condominium in Boulevard Residence developed by D1 for a total value of RM12,822,000 as at 28 August 2019. The plaintiff further claims that, the plaintiff is contractually entitled to LAD on a daily basis at the rate of 10% of the purchase price of each unit until vacant possession is given pursuant to cls. 26(2) and 28(2) of the SPAs. As the plaintiff has been deprived of the enjoyment of the common facilities, the plaintiff is entitled to further LAD at the rate of 10% per annum from 20% of the purchase price payable pursuant to cl. 28(2) of the SPAs. In alternative, the plaintiff claimed for the loss of rental of the plaintiff's MCA units.

[17] In contrast, the defendants took a different stand. It was argued that the assessment of damages should be based on the market value of 18 units of medium-cost apartments in Vista Damansara and not the high-end condominium in Boulevard Residence. Therefore, the value of the plaintiff's MCA units must be based on the specifications stated in the SPAs dated 19 May 2005 as valued by the defendants' expert valuer and the date of valuation should be on 11 March 2008, that is the date of the transfer of the said land from the D2 to D1 as pleaded by the plaintiff in para. 14 of the statement of claim.

The High Court Decision

[18] The LHCJ agreed with the defendants' argument. Based on the Federal Court and the Court of Appeal decision, the damages should be based on the value of 18 units of medium-cost apartments in Vista Damansara and not the high-end condominium in Boulevard Residence. Therefore, the LHCJ accepted the defendants' expert valuation report as correct and rejected the plaintiff's expert valuation report on the ground that it was based on the wrong footing. The LHCJ also rejected the plaintiff's LAD claim and the alternative rental claim for the simple reason that the plaintiff failed to secure

an order for specific performance. The claim for LAD or rental is only possible if the plaintiff is entitled to the physical possession of the plaintiff's MCA units. In this case, no actual delivery of vacant possession of the plaintiff's MCA units can take place since the Vista Damansara project never materialised.

The Appeal

[19] The notice of appeal filed by the plaintiff is as follows:

> Ambil Perhatian bahawa Rumaya Properties Sdn Bhd Perayu yang dinamakan di atas tidak berpuas hati dengan keputusan Yang Arif Dato' Hashim Bin Hamzah yang diberikan di Mahkamah Tinggi Malaya di Shah Alam pada 23 Februari 2022, merayu kepada Mahkamah Rayuan terhadap sebahagian keputusan tersebut yang menolak tuntutan Perayu untuk ganti rugi-ganti rugi seperti berikut:
>
> (a) Ganti rugi untuk nilai 18 unit apartmen sebanyak RM12,822,000 setakat 28.8.2019;
>
> (b) Ganti rugi tertentu dan ditetapkan (liquidated ascertain damages) sebanyak RM4,146,625 atau RM2,099,925.19 alternatifnya kerugian sewa untuk jumlah sebanyak RM7,722,000 atau RM4,257,000; dan
>
> (c) Faedah terhadap amaun-amaun yang dinyatakan di perenggan-perenggan a dan b di atas pada kadar 5% setahun dari tarikh penghakiman, 21 November 2014 sehingga penyelesaian penuh.

[20] In the memorandum of appeal, the plaintiff listed seven main grounds of appeal which predominantly focused on the issue of the value of the plaintiff's MCA units in relation to the consent order entered between the plaintiff and D1 on 11 October 2011. Besides that, the plaintiff also raised the issue of plaintiff's claim on LAD or in the alternative, the plaintiff's claim for rental of the plaintiff's MCA units.

[21] As to the value of the plaintiff's MCA units, learned counsel for the plaintiff argued that the consent order allowed D1 to overcome the legal impediment as the plaintiff agreed not to continue its challenge to the development of Boulevard Residence. D1 then agreed to identify 18 units from Boulevard Residence to be treated as the plaintiff's MCA units from the original SPAs between D2 and the plaintiff. D1 proceeded to develop the high-end condominium units knowing well that it would have to deliver 18 of Boulevard Residence units to the plaintiff in the event the plaintiff is successful in its claim against D2. Learned counsel for the plaintiff also stressed that the consent order specifically refers to Boulevard Residence and not Vista Damansara. It was further argued that the consent order changed the perspective as to how the specific performance of the plaintiff's MCA units under the SPAs ought to be carried out.

[22] Conversely, learned counsel for the defendants submitted that the basis or substratum for the assessment of damages should be based on the Federal Court order dated 28 August 2019 which ordered damages to be assessed *in lieu* of specific performance against the defendants. It was further submitted that the Court of Appeal decision as affirmed by the Federal Court had made it very clear that the monetary compensation to be awarded is in relation to the plaintiff's MCA units in Vista Damansara and not the high-end condominium units in Boulevard Residence.

Our Decision

[23] To begin with, the issue of liability to pay damages for breach of the SPAs related to the purchase of the plaintiff's MCA units in Vista Damansara is well-settled. The relevant matters went up to the apex court and had been finally decided. The defendants were found liable for breach of contract and ordered to pay damages jointly and severally to the plaintiff. On damages, the Federal Court affirmed the Court of Appeal decision to dismiss the plaintiff's claim for specific performance but to allow the plaintiff's claim for damages *in lieu* of specific performance. In those circumstances, the Federal Court upholds the rationale behind the Court of Appeal's decision on the assessment of damages. We cannot revisit the matters that have been finally decided by the apex court.

[24] For the assessment of damages, the plaintiff filed an application before the High Court pursuant to the order of the Federal Court. In the assessment of damages proceedings, parties called their witnesses to give *viva voce* evidence. Part of the evidence came from the valuers, who were called by both parties to give their expert evidence on the value of the plaintiff's MCA units. At the end of the proceedings, the LHCJ decided on an award that should have been given to the plaintiff.

[25] It is a well-established principle of law that a court in assessing the quantum of damages exercises a discretionary jurisdiction and the appellate court will not disturb the finding of the trial judge. More so, in the proceeding that involved *viva voce* evidence where the trial judge had the benefit of seeing and hearing the witnesses. The exercise of the judicial discretion should not be disturbed unless there is a clear error of fact or the judge is plainly wrong on the principle of law, or the amount awarded is extremely high or very small so as to make it an entirely erroneous estimate of the damages to be awarded. See among others, Greer LJ decision in *Flint v. Lovell* [1934] All ER Rep 200 at pp. 202 to 203; Federal Court decision in *Topaiwah v. Salleh* [1968] 1 LNS 161; [1968] 1 MLJ 284 at p. 285; this court decision in *Voo Nyuk Fah & Anor v. Lam Yat Kheong & Anor* [2012] 5 CLJ 229 at pp. 235 to 237; and *Tanjung Tiara Sdn Bhd v. Paragro Sdn Bhd* [2010] 9 CLJ 400; [2011] 4 MLJ 593, at pp. 602-603. For "plainly wrong" test, see Federal Court decision in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1; [2020] 12 MLJ 67.

[26] Reverting back to the appeal before us, the crux of the plaintiff's dissatisfaction is on the amount of damages that had been awarded by the LHCJ to the plaintiff *in lieu* of specific performance of the SPAs. Learned counsel for the plaintiff argued that the LHCJ erred in law and fact when His Lordship decided to accept the defendants' expert evidence on the value of the plaintiff MCA units in Vista Damansara and rejected the plaintiff's expert evidence on the value of the plaintiff's MCA units based on the high-end condominium units in Boulevard Residence.

[27] In his submission, learned counsel for the plaintiff argued that the LHCJ ignores an agreement between parties as to how the specific performance of the SPAs would be carried out. It is further argued that the LHCJ should apply the underlying principle of damages *in lieu* of specific performance in the situation that specific performance in kind pursuant to the consent order. In such situation, the LHCJ should award monetary damages that replace the agreed manner in which specific performance is to be paid notwithstanding the change in circumstances as to the development of the plaintiff's MCA units.

[28] Based on the said arguments, it is clear that learned counsel for the plaintiff strongly relied on the consent order to justify the amount claimed by the plaintiff in the assessment proceeding. The plaintiff took a stand that whilst the Federal Court agreed with the Court of Appeal in refusing the relief of specific performance to the plaintiff, it is undisputed that the Federal Court did not set aside the consent order, nor did the Federal Court rule that the consent order is inapplicable for purposes of assessment. Therefore, it is wrong for the LHCJ to make a finding that the Court of Appeal's decision in allowing the assessment of damages *in lieu* of specific performance, which was affirmed by the Federal Court, had superseded the consent order.

[29] On this issue, learned counsel for the defendants took a different stand. It was argued that from a plain reading of all the paragraphs of the consent order, it clearly shows that the consent order is not about the assessment of damages. The consent order is about the working out of the transfer of the plaintiff's MCA units in the event that the plaintiff succeeded in securing a specific performance order after trial. However, the need to pass on any of the plaintiff's MCA units no longer exists after the specific performance was refused. Thus, the basis for granting the damages *via* the assessment proceedings must follow the directions and/or grounds of judgment of the Court of Appeal which was affirmed by the Federal Court, and not the consent order.

[30] To address this issue, we are of the view that there are three related contemporaneous matters that have to be considered harmoniously. First, the Court of Appeal's decision in allowing D2's appeal in part and denied the plaintiff's specific performance and instead ordered for damages to be

assessed in relation to the plaintiff's MCA units. The decision can be found in *Antara Vista Sdn Bhd v. Rumaya Properties Sdn Bhd* [2017] 1 LNS 1876; [2017] MLJU 1964 (*Antara Vista*'s case). For ease of reference and better understanding, we produced the relevant part of the decision as follows:

> **Should an order of specific performance be, in the circumstances, the appropriate order to be granted as a remedy?**
>
> [45] However, having established that the second defendant was liable, the next issue would be to consider whether specific performance can in the circumstances be granted as prayed for by the Plaintiff in this case and which the learned High Court Judge had so granted in the court below. We are with the second defendant on this issue of specific performance. Specific performance is an equitable remedy and is therefore available to an aggrieved litigant not as a matter of course as a legal relief.
>
> [46] In the cases where specific performance was granted, it was so granted to the litigant when a monetary compensation was not an adequate remedy to address the wrong suffered by the aggrieved Plaintiff in the circumstances of the cases. Being an equitable remedy, it lies entirely in the hands of the Court whether an order of specific performance ought to be granted to the Plaintiff. In the apex Court case of *M Ratnavale v. S Lourdenadin* [1988] 2 MLJ 371 it was held that the granting of an order of specific performance, being discretionary in nature, must be done judiciously without any caprice.
>
> [47] As a matter of law, section 21(2)(b) of the Specific Relief Act 1950 spells out how such discretion ought to be exercised if the Court is not minded to issue an order of specific performance. It states:
>
> > 21(1) ...
> >
> > (2) The following are cases in which the court may properly exercise a discretion not to decree specific performance:
> >
> > (a) ...
> >
> > (b) Where the performance of a contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.
>
> [48] Before us, Mr Justin Voon, learned counsel for the second defendant submitted that in the event that the Plaintiff was successful in establishing the claim for the declaration, the Court ought not to order specific performance against his client [the second defendant] in respect of the said 18 properties as they are no longer in existence, meaning to say, in the form that they were when they were purchased by the Plaintiff from the second defendant. In fact, learned counsel had, in his written submissions stated as follows:
>
> > **It is impossible and absurd – the D1 has developed the units in a Different Project which bears no resemblance to the 18 units. In fact, the P wants an unjust enrichment**.

[49] He had also cited the decided case of *Balbeer Singh a/l Karam Singh & Ors v. Sentul Raya Sdn Bhd* [2014] 5 MLJ 491 to support his contention before us that a monetary compensation was the proper remedy to be awarded *in lieu* of specific performance. Having perused through the Grounds of Judgement of the learned High Court Judge, we noted that he had not dealt with the issue of specific performance in any much detail, save that he granted the prayer for such remedy at the end of his decision. We could only venture to surmise that he had taken that approach on account of the fact that the Plaintiff had succeeded in establishing its case against the second defendant.

[50] In the circumstances of this case, it was also submitted before us that the Damansara Vista apartments had since then been transformed into Boulevard Residences, a different project altogether although developed by the second defendant nevertheless. The Boulevard Residences represents a high-end condominium project, whereas the 18 apartments transacted between the parties in 2005 had been medium cost apartments. Not to mention, innocent third parties may be adversely affected through no fault of theirs, completely. We did not recall having heard any violent objections nor any coherent submissions to the contrary advanced from the Plaintiff's side on this issue.

[51] As such, in line with the dictates of section 21(2)(b) of the Specific Relief Act 1950, we are of the considered view that some difficulties may befall the second defendant which it did not foresee, if an order of specific performance were to be issued against it and that whereas at the same time, its non-performance would involve no such hardship on the Plaintiff.

[52] In the circumstances, we are of the considered view that it would not be a proper nor a judicious exercise of discretion, if an order of specific performance were to be granted against the second defendant. We therefore agree with the learned counsel for the second defendant that a monetary compensation would be the appropriate remedy to be awarded to the Plaintiff in relation to the 18 units of medium-cost apartments that formed the subject matter of the 18 principal agreements. We order that the compensation as damages *in lieu* of specific performance be assessed by the same learned High Court Judge accordingly.

Second, the Federal Court decision on 28 August 2019 related to three appeals filed by the parties. There are no written grounds of decision prepared by the apex court. However, the minutes of the proceedings and the broad grounds of the Federal Court are as follows:

28 Aug 2019 Part Heard

02(f)-57-07/2018(B) [dipanggil bersama 02(f)-54-07/2018(B) & 02(f)-55-07/2018(B)]

MRRS: B-02 (NCVC) (W)13-01/2015

Mahkamah Tinggi Malaya di Shah Alam Guaman Sivil No: WA-22 NCVC-642-10/2016

KORAM:

Y.A.A. Tan Sri Dato' Sri Azahar bin Mohamed, Hakim Besar Malaya
Y.A.A. Datuk Seri Panglima David Wong Dak Wah, Hakim Besar Sabah & Sarawak
Y.A. Dato' Setia Haji Mohd Zawawi bin Salleh, HMP
Y.A. Tan Sri Idrus bin Harun, HMP
Y.A. Datuk Nallini Pathmanathan, HMP

Penolong Kanan Pendaftar bertugas: Puan Sakinah binti Mohamad Pauzi
Jurubahasa: Rodziah Matled

Tempoh masa: 10.00 pg - 12 tgh (2 jam)

(Mahkamah rehat: 10.50 - 11.30)

Gopal: Hujah

Mahkamah: bagaimana dengan consent order?

Justin: If consent order entered, specific performance will take effect
Gurdial: hujah berkenaan specific performance (Soaljawab Mahkamah dengan pihak-pihak)

(Mahkamah rehat - 10.50 - 11.30)

(Gurdial: Bagi kes 02-54: Pohon kos RM100,000 untuk Mahkamah ini dan Mahkamah bawahan. Justin: Pohon kos RM15,000)

Next Date: N/A

MAH:

This is our unanimous decision.

For 02-57: We first deal with appeal no. 57, the third appeal. Appeal by defendant 2. In this case, both the High Court and the Court of Appeal found that the Plaintiff had fully paid for the 18 units and the SPA were valid for each of the 18 units. In our judgment, this finding is supported by documentary and oral evidence tender at trial. We therefore find no valid reason to disturb the concurrent findings of the courts below. We therefore dismiss the appeal with costs and we find no necessity to answer both the questions posed. We award costs of RM30,000 to Plaintiff subject to allocator. Deposit if any refunded.

For 02-54: Now we come to appeal no. 54, the Plaintiff's appeal. In respect of this appeal, we have taken into account all the relevant factors including the present status of the subject matter, the element of unjust enrichment and the issue of clean hands in the context of equitable remedy being sought for. For these reasons, we agree with the decision of the Court of Appeal that specific performance is not a suitable remedy in the present case. We therefore award damages in favour of Plaintiff but vary the order of the Court of Appeal to make both defendant 1 and 2 liable jointly and severally in damages. In the circumstances, we answer the question posed in the affirmative. We make no order as to costs.

For 02-55: Now we come to the last appeal no. 55. We allow the appeal. Consequently, we set aside the order of the Court of Appeal dated 15 December 2017 and the order of the Court of Appeal dated 9 December 2016 is maintained. No order as to costs. In the circumstances, we also find no necessity to answer both the questions posed. Deposit if any refunded.

Third, the consent order that was heavily relied by the plaintiff to persuade us to allow the appeal. For ease of reference, we reproduced the consent order in full as follows:

Dalam Mahkamah Tinggi Malaya Di Shah Alam Dalam Negeri
Selangor Darul Ehsan, Malaysia
Writ Saman No: 22N PVC-5-2011
(dipindah dari Mahkamah Tinggi Kuala Lumpur
Guaman No. S-22NCvC-27-2010)

Antara

Rumaya Properties Sdn Bhd
No Syarikat: 336064-D) Plaintif

DAN

1. Seacera Development Sdn Bhd
   (No Syarikat: 732507-d)
2. Antara Vista Sdn Bhd
   (No Syarikat: 258712-A) Defendan-Defendan

Di Hadapan Yang Arif Hakim
Wan Aprah Binti Dato' Paduka Wan Ibrahim
Pada 11 Haribulan Oktober 2011 Dalam Kamar

Perintah Persetujuan
(Di antara Plaintif dan Defendan Pertama) (Lampiran 1)

Tindakan Ini dipanggil untuk pengurusan kes pada 11 Oktober 2011 Dan Setelah Mendengar Encik Steven How Chee Hong (bersama dengan Encik Nathan Narayanasamy) peguam bagi Plaintif, Encik Sean H M Yeow (bersama dengan Encik Hoi Jack S'ng), peguam bagi pihak defendan Pertama dan Encik Gopi Seshadari (bersama dengan Cik Lian Chiew Yi), peguam bagi pihak Defendan Ke-2 Maka Adalah Diperintahkan Secara Persetujuan Di Antara Plaintif Dan Defendan Pertama

bahawa:

(1) Defendan Pertama hendaklah memindah kesemua hak-hak dan kepentingan-kepentingan dalam 18 unit pangsapuri yang dikenali sebagai Vista Damansara (dan kini dikenali sebagai Boulevard Residence) yang mempunyai unit No. A-4-02, A-5-02, A-6-02, A-6-07, A-15-05, A-13-09, A-13-02, A-14-04, A-13-07, A-9-03, A-12-02, A-8-02, A-10-02, A-3-05, A-2-02, A-3-09, A-3-02 dan A-15-02 (18 Unit) yang akan dibangunkan di atas sebuah tanah yang dipegang di bawah No. Hak milik PN. 15980 Lot 13850 Pekan Kayu Ara, Daerah Petaling, Negeri Selangor Darul Ehsan

(Hartanah) kepada Defendan ke-2 melalui Perjanjian-perjanjian Jual Beli dalam (30) hari dari hari ini dan selepas itu dipegang oleh Defendan Ke-2 sementara, antara lain, penentuan Mahkamah atas siapakah pemilik sah dan benefisial 18 Unit tersebut;

(2) Defendan Ke-2 akujanji untuk tidak berurus dalam apa jua cara pun atau melepaskan milikan 18 Unit tersebut sementara pelupusan akhir tindakan ini dan penentuan hak milik 18 Unit tersebut termasuk apa-apa rayuan dan sekiranya Defendan Pertama mempunyai pengetahuan atas perkara yang sama, Defendan Pertama juga akujanji untuk tidak memberi kebenaran kepada urusan sedemikian;

(3) Sekiranya selepas pelupusan akhir tindakan ini dan apa-apa rayuan, ia adalah ditentukan bahawa Plaintif adalah pemilik sah dan/atau benefisial 18 Unit tersebut, Defendan Ke-2 hendaklah memindah kesemua hak-hak dan kepentingan-kepentingan dalam 18 Unit tersebut kepada Plaintif atas kos dan perbelanjaan Defendan Ke-2 atau Plaintif hendaklah memasuki suatu Perjanjian Jual Beli dengan Defendan Pertama dengan pengakuan penuh Defendan Pertama dan Defendan Ke-2 bahawa harga belian telah pun dibayar secara penuh dalam tempoh masa yang ditentukan oleh Mahkamah;

(4) Defendan Pertama hendaklah berterus dengan pembangunan Hartanah tersebut termasuk 18 Unit tersebut berdasarkan pelan-pelan terpinda Defendan Pertama yang dicadangkan sepertimana yang telah diterbitkan oleh Defendan Pertama untuk projek yang dikenali sebagai Boulevard Residence tertakluk kepada saiz unit-unit tersebut bukan lebih kecil daripada apa yang dinyatakan dalam Perjanjian jual Beli asal di antara Plaintif dan Defendan Ke-2 dan kepada apa apa pindaan dan/atau variasi yang diperlukan oleh pihak-pihak berkuasa yang relevan;

(5) Walaupun terdapatnya kaveat Plaintif atas Hartanah tersebut, Plaintif hendaklah dianggap telah bersetuju kepada Defendan Pertama berurusan dengan Hartanah tersebut untuk kepentingan pembangunan tersebut asalkan Defendan Pertama tidak membebankan 18 unit tersebut;

(6) Akujanji Defendan Pertama yang diberikan pada 10 November 2010 adalah dilarutkan;

(7) Tiada Perintah terhadap kos di antara Plaintif dan Defendan Pertama.

Bertarikh 11 hari bulan Oktober 2011

[31] Upon analysing the above contemporaneous matters, we are of the considered view that the relevant Court of Appeal's order which was affirmed by the Federal Court should be the basis of the assessment of damages before the High Court. As to the mechanism on how to calculate the actual damages to be paid to the plaintiff *in lieu* of specific performance of the plaintiff's MCA units, we are of the view that guidance laid down by the Court of Appeal in its decision in *Antara Vista*'s case at para. [52] should be decisive. For ease of reference, we reproduced the said paragraph as follows:

> [52] In the circumstances, we are of the considered view that it would not be a proper nor a judicious exercise of discretion, if an order of specific performance were to be granted against the second defendant. We therefore agree with the learned counsel for the second defendant that a monetary compensation would be the appropriate remedy to be awarded to the Plaintiff in relation to the 18 units of medium-cost apartments that formed the subject matter of the 18 principal agreements. We order that the compensation as damages *in lieu* of specific performance be assessed by the same learned High Court Judge accordingly.

[32] Based on the said paragraph, we agree with learned counsel for the defendants' submission that the Court of Appeal had directly ruled and held that "a monetary compensation would be the appropriate remedy to be awarded to the plaintiff in relation to the 18 units of medium-cost apartments that formed the subject matter of the 18 principal agreements". With the specific reference to "18 units of medium-cost apartments" which is considered to be "the subject matter of the 18 principal agreements" by the Court of Appeal in its decision, the only inference that can be drawn is that, the Court of Appeal is of the view that the damages to be assessed should be based on the value of the medium-cost apartment in Vista Damansara and not the high-end condominium in Boulevard Residence.

[33] Related to the same matter, it is pertinent to note that the Court of Appeal in *Antara Vista*'s case did consider learned counsel for D2's submission on the issue of unjust enrichment and the differences between the development of Vista Damansara and Boulevard Residence before coming to the conclusion as mentioned in para. [52] as can be seen in paras. [48] and [50] of the grounds of decision. Based on those considerations, the Court of Appeal concluded that the appropriate mechanism to calculate the remedy to be awarded to the plaintiff for the plaintiff's MCA units should be based on the value of medium-cost apartments in Antara Vista that formed the subject matter of the 18 principal agreements.

[34] Next, we move to the Federal Court's decision in relation to the plaintiff's appeal against the Court of Appeal decision on the award of damages to be awarded to the plaintiff. The relevant excerpts from the Federal Court's broad grounds are as follows:

> Now we come to appeal no. 54, the Plaintiff's appeal. In respect of this appeal, we have taken into account all the relevant factors including the present status of the subject matter, the element of unjust enrichment and the issue of clean hand in the context of equitable remedy being sought for. For these reasons, we agree with the decision of the Court of Appeal that specific performance is not a suitable remedy in the present case. We therefore award damages in favour of Plaintiff but vary the order of the Court of Appeal to make both defendant 1 and 2 liable jointly and severally in damages.

From the excerpts, it is clear that the Federal Court did consider all relevant factors in affirming the Court of Appeal's decision to award damages *in lieu* of specific performance to the plaintiff. Among the factors considered are, "the present status of the subject matter" and "the element of unjust enrichment". We are of the considered view that the two elements considered by the Federal Court are decisive indications in assessing the damages *in lieu* of specific performance.

[35] For "the present status of the subject matter", it is undisputed that the development of Boulevard Resident is totally different from the development of Vista Damansara. Boulevard Resident is a high-end condominium and Vista Damansara is a medium-cost apartment. For sure, the cost of developing a high-end condominium is much higher than of developing a medium-cost apartment. In other words, it is not comparing apples to apples.

[36] As to "the element of unjust enrichment", it is crystal-clear that the order of specific performance would unjustly enrich the plaintiff. From the undisputed facts, the plaintiff paid a total sum of RM2,657,950 under the SPAs to purchase the plaintiff's MCA units. If the order for specific performance is allowed, the value of 18 high-end condominiums as certified by the plaintiff's valuer is in the whopping sum of RM12,822,000, a nearly fivefold increase comparing to the transacted value. For sure, there is an element of unjust enrichment element involved, and it would be a windfall to the plaintiff if it is allowed to claim for the order of specific performance.

[37] Based on the said considerations, the Federal Court dismissed the plaintiff's appeal and affirmed the Court of Appeal's decision on the award of damages *in lieu* of specific performance. Should the Federal Court wish to allow the value of the said 18 units high-end condominium of Boulevard Residence to be given to the plaintiff, it would have allowed the plaintiff's appeal against the decision of the Court of Appeal, that is to allow the specific performance order, or the Federal Court would specifically mention that the damages assessed will be based on the high-end condominium units.

[38] Finally, as regards the consent order entered between the plaintiff and D1, we are of the opinion that the said consent order should be read in a purposive manner.

[39] From the plain reading of the first paragraph of the consent order, it shows that D1 agreed to transfer all rights and interests of the plaintiff's MCA units to D2. In the second paragraph, D2 undertake not to deal with or part possession with the plaintiff's MCA units pending the final disposal of the plaintiff's claim. In the third paragraph, D2 shall transfer all rights and interests in the plaintiff's MCA units to the plaintiff in the event that the plaintiff succeeds in its claim. Then, both parties agreed that D1 shall proceed with the development of the said land, including the plaintiff's MCA

units in the Boulevard Residence project notwithstanding the plaintiff's caveat on the said land as provided in the fourth and fifth paragraphs of the consent order.

[40] From the choice of words used in the consent order, it is obvious that D1 desires to proceed with the development of Boulevard Residence and at the same time agreed to preserve the plaintiff's right to make a claim against D2. According to the scheme of the consent order, D1 agreed to transfer the plaintiff's MCA units to D2 as a stakeholder for the plaintiff awaiting the outcome of the plaintiff's suit. Based on the said scheme, it is comprehensible that the parties' intention is to preserve the *status quo* of the plaintiff's MCA units, and to deliver and transfer the said units to the plaintiff in the event that the plaintiff succeeds in getting the specific performance order of the SPAs.

[41] Once the Court of Appeal and later the Federal Court disallowed the specific performance order to the plaintiff, we are of the view that the purpose of the consent order can no longer stand. It became academic or superseded by the apex court's decision. Therefore, the consent order is no longer enforceable in the assessment of damages since the purpose of the order is overtaken by event or, in other words, became obsolete.

[42] On this matter, we agree with learned counsel for the defendants' submission that in fact and substance, the Federal Court which affirmed the Court of Appeal's position that to prevent any hardship, s. 21(2)(b) of the Specific Relief Act 1950 would override the consent order entered between the plaintiff and D1. In such situation, the court can deny the alleged relief by consent in relation to the 18 units of Boulevard Residence and fashion its own just and equitable relief.

[43] Thus, we are of the considered view that the LHCJ is correct in his decision to assess the damages in favour of the plaintiff based on the 18 units of medium-cost apartments in Vista Damansara that formed part of the subject matter in the SPAs entered between the plaintiff and D2, and not the value of high-end condominium in Boulevard Residence which was later developed by D1.

[44] In relation to the assessment of damages, there are two related issues that had cropped up before the High Court. First, the issue on the valuation reports and second, the issue on the effective dates of valuation.

The Valuation Reports

[45] The plaintiff engaged Sr Ong May May (PW2), a registered valuer and a director in PA International Property Consultants (KL) Sdn Bhd, to carry out a valuation of 18 units within the development of Boulevard Residence. According to PW2's expert evidence, the market value of the 18 units of

Boulevard Residence is in the sum of RM12,317,000 as at 15 December 2017 or RM12,822,000 as at 28 August 2019 based on the comparison approach of valuation in determining the market value of the 18 units of the condominium within Boulevard Residence.

[46] Meanwhile, the defendants called Sr Anthony Chua Kian Beng (SD2), a registered valuer and the Executive Director of KGV International Property Consultants to give evidence on the value of the plaintiff's MCA units based on the value of a medium-cost apartment comparable to Vista Damansara. According to SD2, the value of the plaintiff's MCA units based on the comparison method as at 11 March 2008 is RM2,885,000.

[47] On the issue of the experts called to value the plaintiff's MCA units, both valuers took a very different stand. Evidence shows that PW2 prepared a valuation report based on the value of high-end condominium units in Boulevard Residence as at 28 August 2019, which is the date of the Federal Court decision, to value the plaintiff's MCA units as instructed by the plaintiff. No opinion was put forward on the value of a medium-cost apartment which is comparable or equivalent to Vista Damansara. *Vice versa*, SD2 prepared a valuation report only on the value of a medium-cost apartment which is comparable to Vista Damansara.

[48] As regards this issue, we have agreed with the LHCJ's finding that the basis for the assessment of damages should be on the order of the Court of Appeal which is affirmed by the Federal Court to allow damages *in lieu* of specific performance to the plaintiff. We are of the considered view that the appropriate remedy to be awarded to the plaintiff in terms of monetary compensation should be the value of the 18 units of medium-cost apartments that formed the subject matter of the SPAs between the plaintiff and D2, and not the value of high-end condominium in Boulevard Residence. Thus, we find that there is no error in the LHCJ's decision to accept the defendants' expert valuation on the value of the plaintiff's MCA units which is based on the value of the 18 medium-cost apartments and rejected the plaintiff's expert valuation which is based on the wrong footing to value the plaintiff's MCA units based on 18 high-end condominiums in Boulevard Residence.

The Effective Dates Of Valuation

[49] Both parties submitted on a different date to determine the effective dates of valuation in assessing the damages. Learned counsel for the plaintiff argued that the determinative date should be the date of the Federal Court's decision, that is on 28 August 2019. On that date, the Federal Court affirmed the Court of Appeal's decision to award damages *in lieu* of specific performance to the plaintiff. Meanwhile, learned counsel for the defendants submitted that the assessment of damages *in lieu* of specific performance ought to be based on the date of the breach of contract or when the cause of action began.

[50] On this issue, first and foremost, we would like to refer to the House of Lords' decision in *Johnson & Anor v. Agnew* [1980] AC 367. At p. 401, Lord Wilberforce held that:

> In cases where a breach of a contract for sale has occurred, and the innocent party reasonably continues to try to have the contract completed, it would to me appear more logical and just rather than tie him to the date of the original breach, to assess damages as at the date when (otherwise than by his default) the contract is lost. Support for this approach is to be found in the cases. In *Ogle v. Earl Vane* (1867) L.R. 2 Q.B. 275; L.R. 3 Q.B. 272 the date was fixed by reference to the time when the innocent party, acting reasonably, went into the market; in *Hickman v. Haynes* (1875) L.R. 10 C.P 598 at a reasonable time after the last request of the defendants (buyers) to withhold delivery. In *Radford v. De Froberville* [1977] 1 W.L.R. 1262, where the defendant had covenanted to build a wall, damages were held measurable as at the date of the hearing rather than at the date of the defendant's breach, unless the plaintiff ought reasonably to have mitigated the breach at an earlier date.

Back to our jurisdiction, Federal Court in *Cheng Chuan Development Sdn Bhd v. Ng Ah Hock* [1982] 1 LNS 48; [1982] 2 MLJ 222, at p. 227 held as follows:

> In our judgment to measure the respondent's loss or damage with reference to the date of the trial is not only unrealistic but also outside the ambit of the rule relating to remoteness of damages. The respondent is only entitled to a sum of money which would compensate him for the loss which naturally arose from the breach. He sustained the loss only when he was deprived of the opportunity to buy the shophouse, and this surely occurred when the appellant sold the house to a third party and not subsequently. It was only on that date that he was to have the house sold to him but it was on that date the house was sold to someone else. Thus, if he had to buy the house or another house as a substitute therefor on that date, he would have to pay $85,000. In other words, he had to find an extra $35,500 over and above the $49,500 contract price. That is the amount which could be regarded as naturally flowing from the breach by the appellant. In fact, the law on the subject is already settled in that in the case of breach of contract assessment of damages has to be made as on the date of the breach. *Engell v. Fitch* (1868-1869) LR 4 QB 659, 669 and *Lee Heng & Co v. C Melchers & Co* [1963] MLJ 47. As the learned trial judge correctly applied the principle counsel's submission must fail.

See also this court decision in *Lee Tiow Kee & Anor v. Ng Geok Hwa* [2017] 6 CLJ 339; [2017] 4 MLJ 92, at pp. 100 and 101.

[51] Guided by the principles decided in those cases, we are of the view that the assessment of damages in the present case should be as at the date when the contract is lost. Thus, the relevant date should be the date when D2 transferred the said land to D1 on 11 March 2008. We find that there is nothing wrong with the LHCJ view that the effective date of the assessment shall be the date when the SPAs were lost because the project was never materialised, and the said land was sold to D1 before the date of delivery of vacant possession.

A **Plaintiff's LAD Claim Or Alternatively Rental Claim**

[52] In his grounds of judgment, the LHCJ addressed the issue of the plaintiff's LAD claim as follows:

> [41] However, I agree with the defendants that this claim should not be allowed since the Plaintiff was not allowed the relief of specific performance. I agree with the defendants that the claim for LAD is only possible if the Plaintiff is entitled to the physical possession of the 18 apartment units and there was a delay in delivering vacant possession. However, I am of the considered view that the issue of LAD did not arise since the land had been sold by the first defendant to the second defendant before the supposed date of delivery of vacant possession. LAD is a claim payable for late delivery which should commence from the supposed date of delivery of vacant possession until the actual delivery of vacant possession. In the present case, the actual delivery can never take place since the project never materialised.

[53] Learned counsel for the plaintiff submitted that the LHCJ failed to consider that damages *in lieu* of specific performance is awarded on the basis of compensation payable to the innocent party had the contract been performed. As such, if the SPAs had been performed, then LAD would certainly be payable. To rule otherwise would be to allow D1 and D2 to take advantage of their own wrong, that is, as a result of their breach, they need not honour the contractual terms that they have agreed to. In alternative of the LAD claim, the plaintiff is asking for loss of rental of the plaintiff's MCA units.

[54] On the contrary, learned counsel for the defendants argued that the plaintiff should not be allowed to claim for LAD or loss of rental in view of the fact that the plaintiff is not entitled to the relief of specific performance of the plaintiff's MCA units. As D2 is not expected to give vacant possession of the plaintiff's MCA units to the plaintiff, the question of LAD's or rental's claim for the plaintiff's MCA units does not arise at all. In other words, the claim for LAD or loss of rental is only possible if the plaintiff is entitled to the physical possession of the plaintiff's MCA unit and there is a delay in delivery of that vacant possession, which is not the case here.

[55] We have carefully considered the submissions on the plaintiff's claim for LAD or alternatively for loss of rental. From the facts of the case, it is not disputed that D2 had breached the SPAs when it abandoned Vista Damansara's development and disposed of the said land to D1 on 11 March 2008. Plaintiff's claim for specific performance of the plaintiff's MCA units was refused by the Court of Appeal and the said decision was later affirmed by the Federal Court. Stemming from the decision, it is explicit that D2 no longer has the ability to deliver vacant possession of the plaintiff's MCA

units to the plaintiff under the SPAs. The LHCJ was correct in his finding that the actual delivery of the plaintiff's MCA units under the SPAs could never take place since the project never materialised. Therefore, the claim for LAD or loss of rental based on the plaintiff's MCA units in Vista Damansara is not claimable.

Conclusion

[56] For all the reasons adumbrated above, we find that there is no merit in the plaintiffs' appeal to warrant our appellate intervention. Accordingly, we are unanimous in dismissing this appeal with cost. We affirmed the award of damages as assessed by the High Court. The plaintiff is hereby ordered to pay cost of RM20,000 to D2 subject to allocatur.